

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5415

15

JOSEPH CANTER, APPELLANT,

vs.

**RAILWAY EXPRESS AGENCY, INCORPORATED,
A CORPORATION.**

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

FILED JUNE 4, 1931.

PRINTED AUGUST 13, 1931.

Court of Appeals of the District of Columbia

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vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,
A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5415.

JOSEPH CANTER, Appellant,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED, a Corporation.

a Supreme Court of the District of Columbia.

At Law.

No. 78982.

JOSEPH CANTER, Plaintiff,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED, a Corporation,
Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Declaration.

Filed December 11, 1930.

In the Supreme Court of the District of Columbia.

Law. No. 78982.

JOSEPH CANTER, Plaintiff,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED, a Corporation,
Defendant.

The plaintiff, Joseph Canter, sues the defendant, the Railway Express Agency, Incorporated, a corporation, by reason of the following facts:

1. The plaintiff avers that on, to-wit, the 18th day of September, 1930, the defendant was engaged in transporting and delivering goods, wares, merchandise and personal property throughout the City of Washington, in the District of Columbia, and of unloading the same from its trucks, wagons or motor vehicles, to and upon the public sidewalks maintained for the use of pedestrians in the lawful use thereof.

2. And the plaintiff avers that it became and was the duty of the said defendant to use due and proper care in unloading goods, wares, merchandise and personal property from its trucks, wagons or motor vehicles, to and upon the public sidewalks in the District of Columbia as aforesaid, but the plaintiff avers that the said defendant did not use such care aforesaid, and negligently and carelessly conducted itself in this behalf.

3. The plaintiff avers that while he was walking along and upon the public sidewalk maintained for the use of pedestrians lawfully upon the use of the same in the City of Washington, in the District of Columbia, on "B" Street, near 9th Street, Northwest, he stumbled and fell upon and across certain planks, or boards, or lumber, which the said defendant negligently and carelessly placed upon the said sidewalk, one end of which was upon the said sidewalk, and the other end of which said boards, planks, or lumber, rested upon the end of the wagon, truck, or motor vehicle of the said defendant, and that the said planks, boards or lumber were so placed upon the said sidewalk by the said defendant as to render the use of the said sidewalk dangerous to those lawfully passing along and upon the same.

4. The plaintiff avers that while walking along and upon the said public sidewalk as aforesaid, he stumbled and fell across the said planks, boards, or lumber placed upon the said sidewalk by the said defendant as aforesaid, and by reason thereof, was thrown violently to the ground and sustained serious, dangerous and permanent injuries.

5. The plaintiff avers that by reason of the premises the plaintiff was injured in and about his head, face and body, suffered bruises and contusions in and about his head, face, body and limbs, suffered internal injuries; an injury to his chest, suffered a severe shock to his nervous system, from all of which he was made and rendered sick, sore, lame and

disabled, and from which he suffered great physical pain and mental anguish and will in the future so continue to suffer, and is permanently maimed, disfigured and disabled.

Wherefore the plaintiff brings this suit and claims damages in the sum of Ten Thousand (\$10,000.00) Dollars, besides costs.

T. MORRIS WAMPLER,
JOSEPH C. TURCO,
Attorneys for Plaintiff.

Memoranda.

January 2, 1931.—Demurrer to declaration filed.

January 23, 1931.—Demurrer to declaration sustained, with leave to file an amended declaration within ten days.

Amended Declaration.

Filed February 13, 1931.

* * * * *

The plaintiff, Joseph Canter, sues the defendant, the Railway Express Agency, Incorporated, a corporation, by reason of the following facts:

1. The plaintiff avers that on, to-wit, the 18th day of September, 1930, the defendant was engaged in transporting and delivering goods, wares, merchandise and personal property throughout the City of Washington, in the District of Columbia, and of unloading the same from its trucks, wagons or motor vehicles, to and upon the public sidewalks maintained for the use of pedestrians in the lawful use thereof.

2. And the plaintiff avers that it became and was the duty of the said defendant to use due and proper care in unloading goods, wares, merchandise and personal property from its trucks, wagons or motor vehicles, to and upon the public sidewalks in the District of Columbia as aforesaid, but the plaintiff avers that the said defendant did not use such care aforesaid, and negligently and carelessly conducted itself in this behalf.

3. The plaintiff avers that while he was walking along and upon the public sidewalk, maintained for the use of pedestrians lawfully upon the same, in the City of Washington, in

the District of Columbia, on "B" Street, near 9th Street, Northwest, he stumbled and tripped against and upon certain planks, or boards, or lumber, which the said defendant negligently and carelessly placed upon the said sidewalk, one end of which was upon the said sidewalk, at a distance of, to-wit, three feet from the curb, and the other end of which said boards, planks, or lumber, rested upon the end of the wagon, truck, or motor vehicle of the said defendant standing at and near the curb, so that the said boards, planks or lumber, extended from a point in said sidewalk, to-wit, three feet from the curb, to the curb and beyond, and constituted and was an obstruction to passage over and upon said sidewalk, and which said obstruction, so placed upon the said sidewalk, rendered the use of the said sidewalk dangerous to persons walking along and upon the same, and the said planks, boards or lumber were so placed upon the said sidewalk, as aforesaid, by the said defendant, as to render the use of the said sidewalk dangerous to those lawfully passing along and upon the same.

4. The plaintiff avers that while walking along and upon the said public sidewalk as aforesaid, he stumbled and fell over and across the said planks, boards, or lumber placed upon the said sidewalk by the said defendant as
5 aforesaid, and by reason thereof, was thrown violently to the ground and sustained serious, dangerous and permanent injuries.

5. The plaintiff avers that by reason of the premises the plaintiff was injured in and about his head, face and body, suffered bruises and contusions in and about his head, face, body and limbs, suffered internal injuries; an injury to his chest, suffered a severe shock to his nervous system, from all of which he was made and rendered sick, sore, lame and disabled, and from which he suffered great physical pain and mental anguish and will in the future so continue to suffer, and is permanently maimed, disfigured and disabled.

Wherefore the plaintiff brings this suit and claims damages in the sum of Ten Thousand (\$10,000.00) Dollars besides costs.

T. MORRIS WAMPLER,
JOSEPH C. TURCO,
Attorneys for Plaintiff.

Demurrer to Amended Declaration.

Filed February 25, 1931.

* * * * *

The defendant says that the amended declaration filed herein is bad in substance.

MINOR, GATLEY & DRURY,
By ARTHUR P. DRURY,
Attorneys for Defendant.

NOTE.—The matter of law intended to be argued in support of the foregoing demurrer is that said declaration does not set forth any facts showing actionable negligence on the part of the defendant, but states only conclusions with respect thereto.

T. Morris Wampler, Esq.,
Joseph C. Turco, Esq.,
Attorneys for Plaintiff.

SIRS:

Please take notice that we will calendar the foregoing demurrer for hearing on Friday, March 6, 1931, at ten o'clock A. M. or as soon thereafter as counsel may be heard.

MINOR, GATLEY & DRURY,
By ARTHUR P. DRURY,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

Friday, March 13, 1931.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record and thereupon the defendant's demurrer, filed herein to the amended declaration, is argued and submitted to the Court, and being considered, is hereby sustained. Whereupon, plaintiff, by his said attorneys, in open Court, elects to stand upon his declaration and thereupon

the amended declaration is hereby dismissed and it is considered that plaintiff take nothing by this action; that defendant go hence without day, be for nothing held, and recover of plaintiff herein its costs of defense to be taxed by the Clerk and have execution thereof.

7 From the foregoing judgment the plaintiff by his said attorneys in open Court notes an appeal to the Court of Appeals; whereupon the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars, or in lieu thereof a deposit of \$50.00 in cash with the Clerk.

Memorandum.

March 31, 1931.—Cost bond on appeal approved and filed.

Assignment of Errors.

Filed March 31, 1931.

* * * * *

The plaintiff assigns as error committed by the court herein the following:

1. Sustaining the demurrer to the amended declaration and entering judgment for the defendant, thereon.

T. MORRIS WAMPLER,
JOSEPH C. TURCO,
Attorneys for Plaintiff.

Service of a copy of the above is acknowledged this 30th day of March, 1931.

MINOR, GATLEY & DRURY,
Attorneys for Defendant.

8 *Designation of Record.*

Filed March 31, 1931.

* * * * *

The Clerk of the Supreme Court of the District of Columbia will please prepare record on appeal in this case and the following papers are hereby designated as being necessary to be copied:

1. The Declaration.
2. The Amended Declaration.
3. The Demurrer to the Amended Declaration.
4. The Judgment of the Court upon the Demurrer to the Declaration.
5. Memo.—Appeal noted in open Court.
6. Memo.—Cost Bond approved and filed.
7. The Assignment of Errors.
8. This Designation.

T. MORRIS WAMPLER,
JOSEPH C. TURCO,
Attorneys for Plaintiff.

Service of a copy of the above is acknowledged this 30th day of March, 1931.

MINOR, GATLEY & DRURY,
Attorneys for Defendant.

9 *Additional Designation of Record.*

Filed April 1, 1931.

* * * * * * *

Now comes the defendant, appellee in the above entitled cause, by its counsel, and directs the Clerk in making up the transcript of record on appeal in said cause, to include therein the following papers and proceedings in addition to those designated by counsel for appellant, namely:

1. Memo.—Demurrer filed to original declaration.
2. Memo.—Order sustaining demurrer with leave to amend.
3. This additional designation.

MINOR, GATLEY & DRURY,
By ARTHUR P. DRURY,
Attorneys for Defendant, Appellee.

10 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 9, both inclusive, to be a true

and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 78982 at Law, wherein Joseph Canter is Plaintiff and Railway Express Agency, Incorporated, a Corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 26th day of May, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5415. Joseph Canter, appellant, vs. Railway Express Agency, Incorporated, a corporation. Court of Appeals, District of Columbia. Filed Jun. 4, 1931. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 2 - 1931

Henry W. Hodges

Court of Appeals, District of Columbia

APRIL TERM, 1931.

No. 5415.

JOSEPH CANTER, *Appellant*,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,
A CORPORATION, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLANT.

T. MORRIS WAMPLER,
JOSEPH C. TURCO,
Counsel for Appellant.

Court of Appeals, District of Columbia

APRIL TERM, 1931.

No. 5415.

JOSEPH CANTER, *Appellant*,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,
A CORPORATION, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

A demurrer to the original declaration herein was sustained with leave to amend.

As amended declaration was filed (R. p. 3) and a demurrer to the amended declaration was sustained (R. p. 5) and the plaintiff elected to stand upon his declaration, judgment was entered dismissing the plaintiff's suit and from such judgment this appeal is prosecuted.

The plaintiff was injured in falling over obstructions placed upon a sidewalk by the defendant, while the plaintiff was lawfully proceeding upon the said sidewalk, and the amended declaration alleges that the plaintiff stumbled and tripped against and upon certain planks or boards or lumber which the defendant negligently and carelessly placed upon the sidewalk, one end of which was upon the sidewalk and a distance of three feet from the curb and the other end of which said boards, planks or lumber rested upon the end of the wagon, truck or motor vehicle of the defendant, which was standing at and near the curb, so that the said boards, planks or lumber extended from a point in said sidewalk three feet from the curb, to the curb and beyond, and that this constituted the obstruction which rendered the said sidewalk dangerous to persons lawfully using the same.

The demurrer challenges the legality of the cause of action thus alleged because it is stated that the declaration does not set forth any facts showing actionable negligence on the part of the defendant but states only conclusions with respect thereto (R. p. 5).

The declaration specifically alleges that the defendant negligently placed an obstruction upon the sidewalk, describing of what the obstruction consisted.

The decision of the court sustaining the demurrer is tantamount to a holding, as a matter of law, that a pedestrian may not recover when injured by falling over an obstruction carelessly and negligently placed in a public sidewalk. This holding is not consistent with the adjudicated cases.

ARGUMENT.

1. That a pleading states a cause of action by alleging the placing, carelessly and negligently, of an

obstruction in a sidewalk, such as alleged in the declaration, is established by the authorities.

A PEDESTRIAN HAS A RIGHT TO ASSUME THE SAFETY OF A PUBLIC SIDEWALK, AND IS NOT REQUIRED TO BE ON THE LOOKOUT FOR DANGERS OR OBSTRUCTIONS THEREIN OR THEREON.

In *D. C. vs. Haller*, 4 App. 405, it is said:

“In such actions as the present two things must concur to support the action. First, the injury must be shown to have been caused by a defective condition of the street or sidewalk—such defective condition being shown to exist by the negligence of the defendant; and, second, that there was no want of ordinary care to avoid such injury, on the part of the plaintiff. *Ordinary care is presumed to have been observed, until the presumption is overcome, by proof in defense*; and by ordinary care is intended ordinary prudence, which does not require the traveler to look far ahead for obstructions or defects which ought not to be suffered to exist. *For it is a general rule that a traveler has a right to assume the safety of a public way or sidewalk, and is not bound to be on the lookout for special danger therein.*”

And to the same effect: *Thompson v. Bridgewater*, 7 Pick. 188; *Palmer v. Andover*, 2 Cush. 600; *Jennings v. Van Shaick*, 108 N. Y. 530; *Pettengill v. City of Yonkers*, 116 N. Y. 558; *Buck v. Biddeford*, 82 Me. 433; *Osborne v. Detroit*, 32 Fed. Rep. 36.

In *Mosheuvel vs. D. C.*, 191 U. S. at page 259, the Court said:

“In *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73, it was held ‘that the fact that the plaintiff

saw the obstruction created by the defendant, and knew its dangerous character, is not conclusive proof that he was negligent in attempting to pass it. *A person who, in the lawful use of a highway, meets with an obstacle, may yet proceed if it is consistent with reasonable care so to do; and this is generally a question for the jury, depending upon the nature of the obstruction and all the circumstances surrounding the party.* In the case at bar, if the plaintiff had reasonable cause to believe that he could pass the obstruction in safety, and used reasonable care in the attempt, he is entitled to recover.”

The Supreme Court continuing, referring to and quoting from a number of cases, said:

“We take from a few of those cases some pertinent passages. In *Gerdes vs. Christopher & Co.*, 124 Mo. 347, the rule was thus tersely stated:

“It is the duty of a traveler on a public street to exercise reasonable care; but it is held that the use of a street known to be defective or obstructed cannot be charged as negligence in law.”

“In *Sandwich v. Dolan*, 141 Ill. 430, 31 N. E. 416, the principle was thus stated:

“These instructions were properly refused. They announce, in substance, the proposition that, where a party goes upon a sidewalk which he knows to be in a dangerous condition, he is thereby guilty of negligence per se. Such is not the law. *Sandwich v. Dolan*, 133 Ill. 177, 24 N. E. 526; *Flora v. Nancy*, 136 Ill. 45, 26 N. E. 645; *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091. The use of a sidewalk with knowledge of its dangerous condition may be evidence of negligence, but it is not negligence as a matter of law. *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091. In *Bloomington v. Chamberlain*, 104 Ill. 268, an instruction was held to

be erroneous which told the jury that 'the law required the plaintiff to go out into the street, and pass around the walk, if she knew it was defective.' Whether it is obligatory upon the plaintiff to pass over the walk known by her to be unsafe, or to pass around it upon the street, or to take the walk on the opposite side of the street, was a question which it was not the province of the court to determine as a matter of law. It is a question of fact for the jury whether, in passing over a walk known to be dangerous, instead of taking some other route, the plaintiff is or is not in the exercise of ordinary care. *Sandwich v. Dolan*, 133 Ill. 177, 24 N. E. 526."

In *Johnson v. City of Fargo*, (No. D.) 108 N. W. 243, a case similar to the case at bar in every respect, the declaration alleged:

"That on or about the 24th day of March, 1904 * * * the plaintiff was lawfully upon the sidewalk * * * when said plaintiff was then and there tripped up by a wire guyrope attached to said sidewalk * * * that such rope was attached to the top of a fruit or a notions stand out in the street and ran down to and around a stringer of the sidewalk."

"The contention is that the wire was not an obstruction on the sidewalk, but was an obstruction in the street, if an obstruction at all. Whether the wire was over the walk, or at the end thereof, and attached to a stringer, or attached to the posts in the street so close to the walk as to be practically a part of the walk, is not material. * * * The question is, was the wire as attached an obstruction on the sidewalk? We think that it was a question for the jury to determine. In effect, and when considered with the right of a pedestrian to walk on the outer edge of the sidewalk or to leave the sidewalk to

go upon the street it was an obstruction. * * * When occasion demands their (pedestrians) leaving the sidewalk, or seems necessary, or is convenient, they have a right to presume that the street and sidewalk are free from dangerous obstruction."

In *Heckman v. Evanson*, (Mich.) 73 N. W. 427, it was held that, if a pedestrian is exercising due care and in so doing, walks along or across a street, he has a right to leave the sidewalk at such points as suits his convenience, and he has a right to presume and act upon the presumption that the street is reasonably safe and free from dangers to travelers for its entire width.

In *Finch vs. Village* (Mich.), 94 N. W. 738, it appeared that the plaintiff was injured as she stepped from a sidewalk over the curb into the gutter and fell over a board left in the gutter by the defendant. The Court said:

"We are of the opinion that there is testimony in this case from which it can be inferred that the plaintiff fell over a board and that it was placed in the gutter by the agents of the city * * * and while it may not have been negligent for the city in making its repairs in placing materials in the highway in a reasonable manner and place * * * having in view its obligation to the public and its protection, it was for the jury to determine."

In *Brush Elec. Co. v. Kelly* (Ind.), 10 L. R. A. 250, in which the direct question of the sufficiency of the declaration was raised, the Court, in its opinion, set forth the declaration as follows:

"The charge in the complaint, shortly stated, is that while the appellant, by its servants, was erecting and placing a line of wire to be used in

supplying electricity for light along Main Street in the City of LaFayette, it negligently and carelessly placed and allowed to remain on and along the side walk of said street a wire; and that during the time said wire was thus negligently permitted to lie upon said sidewalk the appellee walked carefully along said sidewalk where said wire was lying, and, without her fault, her foot caught and became entangled with said wire, whereby she was violently thrown to the ground and permanently injured."

"The appellant's counsel argued but two questions: (1) Does the complaint state a good cause of action? (2) Was the appellant entitled to judgment upon the special verdict? We are of the opinion that both questions must be answered in the affirmative. * * * The complaint alleges that the occurrence happened in the day time and it is argued that it was the duty of the appellee to have observed the wire or to specifically allege some sufficient reason why she did not.

"We do not think that it necessarily follows that the appellee was prima facie guilty of negligence in not observing the obstruction. She had the right to presume that the sidewalk was free from obstruction until her attention was in some way called thereto, and to act upon such presumption." * * *

"A small wire lying along a sidewalk might very reasonably be overlooked by a passerby who has no notice thereof, and the fact that it is overlooked does not necessarily indicate negligence. *We cannot hold, as a question of law, that a person may not pass along a sidewalk cautiously and fail to observe a small wire lying along or against it; and then we can imagine many circumstances whereby the attention of the pedestrian might be attracted from the sidewalk, which would be sufficient to divert the attention of any reasonably prudent person.*"

"When the plaintiff assuming that a sidewalk was safe and knowing nothing to the contrary,

permitted her attention to be momentarily attracted to some children playing in the street and fell into a hole in the sidewalk from which the cover had been removed, she was held not guilty of contributory negligence.”

Barry v. Terkildsen, 72 Calif. 254.

Hussey v. Ryan, 64 Md. 426.

Jennings v. Van Schaick, 108 N. Y. 530.

Kelley v. Blackstone, 147 Mass. 448.

IT IS NOT NECESSARY FOR THE PLAINTIFF TO ALLEGE DUE CARE UPON HIS PART AND THUS ANTICIPATE THE DEFENSE.

In the case of Tex. & Pac. R. R. Co. v. Volk, 151 U. S. 73, the Court said:

“By the settled law of this Court, not controverted at the bar, contributory negligence on the part of the plaintiff need not be negatived or disproved by him, but the burden of proving it is upon the defendant.”

To the same effect:

Inland & S. Coasting Co. v. Tolson, 139 U. S. 551.

Berry v. Lake Erie & C. R. Co., 70 Fed. 193.

CONCLUSION.

It is earnestly submitted that the demurrer admitting all facts, well pleaded, the declaration alleges a cause of action and that the judgment of the lower Court should be reversed and the declaration held to be good.

Respectfully submitted,

T. MORRIS WAMPLER,

JOSEPH C. TURCO,

Counsel for Appellant.

FOR MR. CHIEF JUSTICE MARTIN

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

OCT 17 1931

Henry W. Hodges

CLERK

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1931.

No. 5415

JOSEPH CANTER, APPELLANT,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,
A CORPORATION.

BRIEF ON BEHALF OF APPELLEE.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Attorneys for Appellee.

IN THE
Court of Appeals, District of Columbia.

APRIL TERM, 1931

No. 5415

JOSEPH CANTER, APPELLANT,

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED,
A CORPORATION.

BRIEF ON BEHALF OF APPELLEE.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the District of Columbia sustaining a demurrer to an amended declaration, and, the plaintiff (appellant) electing to stand upon said declaration, dismissing the action (R., p. 5).

The amended declaration filed by the plaintiff after a demurrer had been sustained to the original declaration (R., p. 3) attempts to set forth a cause of action against the appellant (hereinafter referred to as the defendant) upon the following allegations:

In September, 1930, the defendant was engaged in transporting and delivering goods in the District of Columbia and unloading them on the public sidewalks used by pedestrians, and it thereby became its duty to use due and proper care in unloading such goods from its trucks to the sidewalks (R., p. 3).

While the plaintiff was walking along B Street near 9th Street northwest, he stumbled and tripped against certain boards which the defendant had placed upon the sidewalk, one end of which boards rested on the end of the truck standing at the curb and the other end rested on the sidewalk about three feet from the curb, which said boards constituted an obstruction to passage on the sidewalk, and which obstruction rendered the use of the sidewalk dangerous to persons walking along it (R., p. 4). Plaintiff "stumbled and fell over and across the said planks" placed as aforesaid, and was injured (R., p. 4).

The declaration was demurred to upon the ground that it set forth no *facts* showing actionable negligence on the part of the defendant, but stated only conclusions with respect thereto (R., p. 5) and upon the demurrer being sustained the plaintiff elected to stand upon his declaration as amended and noted this appeal (R., p. 5).

ARGUMENT.

The declaration does not set forth **FACTS** showing actionable negligence on the part of the appellee.

The allegations of the declaration setting forth the gist of the cause of action are as follows:

“* * * while he was walking along and upon the public sidewalk, maintained for the use of pedestrians lawfully upon the same, * * * on B Street near 9th Street, northwest, he stumbled and tripped against and upon certain planks * * * which the said defendant negligently and carelessly placed upon the said sidewalk, one end of which was upon the said sidewalk, at a distance of, to-wit, three feet from the curb, and the other end of which said boards * * * rested upon the ends of the wagon * * * of the said defendant standing at and near the curb, so that the said boards * * * extended from a point in the sidewalk, to-wit, three feet from the curb, to the curb and beyond, and constituted and was an obstruction to passage over and upon said sidewalk, and which said obstruction, so placed upon the said sidewalk, rendered the use of the said sidewalk dangerous to persons walking along and upon the same, and the said planks * * * were so placed upon the said sidewalk, as aforesaid, by the said defendant, as to render the use of the said sidewalk dangerous to those lawfully passing along and upon the same” (R., pp. 3, 4).

It appears from these allegations of the declaration that the defendant was engaged in unloading mer-

chandise from one of its trucks on B Street, near 9th Street, Northwest (which the court judicially knows to be the location of the old Center Market); and was using skid boards from the end of the truck to the sidewalk to assist in the unloading; and the plaintiff “stumbled *and* tripped against and upon” these boards.

Under the rule that the pleading is to be construed most strictly against the pleader, the allegation would appear to mean that the plaintiff’s “stumble” occurred independently of, and prior to, his “trip” against the skid boards and in paragraph No. 4 of the declaration the averment is made that

“plaintiff stumbled *and fell over and across* the said planks,”

which is clearly susceptible of the interpretation that the plaintiff first stumbled and then, as a result of that stumble, fell over and across the planks or skid board.

But, however that may be, it is clear that *the declaration does not contain a definite and positive averment that the plaintiff tripped and fell as a result of coming in contact with the skid boards only*. In any event there is no showing that the plaintiff stumbled, or tripped, or fell, as the result of any negligent act or omission on the part of the defendant.

The use of boards in the manner indicated in the declaration is a lawful use and does not constitute, in itself, an unlawful obstruction of the sidewalk.

“It is not every obstruction, irrespective of its character or purpose, that is illegal, even

though not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of the public transit. * * * Temporary obstructions of this kind are not invasions of the public easement, but simply incident to or limitations of it. They can be justified when, and only so long as they are, reasonably necessary. There need be no absolute necessity; it suffices that the necessity is a reasonable one."

2 Dillon, Municipal Corporations (4th Ed.), sec. 730.

In the case of *Welsh vs. Wilson*, 101 N. Y., 254, the use of skid boards was considered by the court, the court saying:

"The defendant, desiring to remove two large cases of merchandise from his store in the City of New York placed a pair of skids from a truck across the sidewalk to the steps of the store. It would not have taken more than five minutes to remove the cases from the store to the truck. After the skids had been there about two minutes the plaintiff came along the sidewalk and seeing the skids in her pathway turned towards the store and attempted to pass around the skids and in doing so she slipped upon the steps and was injured; and then she brought this action to recover damages.

"The defendant had the right to place the skids across the sidewalk temporarily for the

purpose of removing the cases of merchandise. Every one doing business along a street, in a populous city, must have such a right to be exercised in a reasonable manner so as not to unnecessarily encumber and obstruct the sidewalk. When the plaintiff found this obstruction in her pathway she had the option either to wait a couple of minutes or to cross the street and pass upon the other sidewalk, or to pass around the truck in the street or to take the way she selected. The defendant was under no obligation to furnish her a safe passage way around the obstruction.”

In the case of *Smith vs. Locke Coal Company* (Mass.), 164 N. E. 381, not yet officially reported, but annotated in 61 A. L. R. 1052, the plaintiff was injured while walking in the street to get around a chute across the sidewalk used in delivering coal from a wagon. The court says:

“The delivery of coal across a sidewalk by means of a chute, as in this case, with nothing to show that it has taken an unreasonable time, is only a mere temporary inconvenience to travelers and hence not an unlawful occupation of the way; nor does it constitute a nuisance.”

The Supreme Court of the United States in the case of *Wolf vs. District of Columbia*, 196 U. S. 152, and this Court in the case of *District of Columbia vs. Duryee*, 29 App. D. C. 327, has recognized the fact that there may be obstructions in the streets and sidewalks of the District of Columbia which are legal and in the latter case it was said if the obstruction was legal

that there could be no recovery of damages in the absence of negligence.

It appears, then, that the defendant was engaged in doing a lawful act when it placed the skid boards from the end of its truck to the sidewalk for the purpose of unloading goods from the truck. What did the defendant do, or neglect to do, according to the averments of the declaration, which resulted in injury to the plaintiff? In other words, of what neglect was the defendant guilty so that he can be held liable for doing a lawful thing?

The negligence charged against the defendant in this declaration is that it "negligently and carelessly" rested a board on the end of its truck, which was backed to the curb, so that one end of the board rested on the sidewalk three feet from the curb, which constituted an "obstruction" to passage over the sidewalk and made the use thereof "dangerous" to pedestrians.

It is not claimed that as a result of using these skid boards the plaintiff was not left with a safe place to walk and was obliged to step over them;

It is not claimed that the skid boards were hidden from the view of the plaintiff;

It is not claimed that the skid boards were permitted to remain on the sidewalk for an unnecessarily long space of time so that they unnecessarily encumbered and obstructed the sidewalk;

It is not claimed that the accident occurred in the nighttime;

It is not claimed that there was any duty on the part of the defendant to maintain a guard for the pur-

pose of keeping the plaintiff from walking into what must have been obvious;

It is not claimed that the skid boards project^{ed} beyond the market stands on the sidewalk (and as it is a matter of common knowledge that farmers were permitted to have stands on the sidewalks along B Street we think the Court might take judicial knowledge thereof);

It is not claimed that the defendant was negligent in any way except in using a skid board as an aid to unloading goods from its truck by placing the board three feet from the curb.

Had the plaintiff stumbled over one of the stands erected on the curb of B Street for the use of the market farmers, or had he stumbled over a hitching post that might have been set in the edge of the sidewalk for their use, could it be said that a declaration alleging only that due care was not used by the defendant and as a result plaintiff fell over the stand or post, state a good cause of action without some definite allegation of *fact* showing negligence?

This Court, under other circumstances, has approved an observation most pertinent to this case:

“They are liable for the consequences, *not of danger, but of negligence*; * * *”

Asphalt Co. *vs.* Mackey, 15 App. D. C., 410, 426.

So, this defendant, making a lawful use of the street, would be liable, not for danger (if, indeed, that existed at all in this situation) but for its *negligence*.

If the plaintiff had stumbled over a hitching post

(a lawful obstruction), he could not recover for any damage he might have sustained in the absence of a showing of *negligence* on the part of the person maintaining the post. That has been definitely decided by this Court in the case of *District of Columbia vs. Duryee*, 29 App. D. C., 327, 333, where this Court said:

“Had it been clear that its condition was not defective, this post would not have been an unlawful obstruction on the sidewalk where it was placed, and the plaintiff could not have recovered for injuries suffered by stumbling over it.”

And this Court said in the same case, page 337:

“It was the plaintiff’s duty, when intending to cross at this point, not only to consider the water in the gutter, but such lawful obstructions as might be found at the curb, such as a man using ordinary care might observe and thus avoid.”

It is submitted that, in the absence of a claim that the use of the sidewalk by the defendant was illegal, or in the absence of a statement of *facts* showing negligence on the part of the defendant in making a lawful use of the sidewalk, the declaration did not state a cause of action.

It will be observed that the plaintiff does not undertake to sustain the proposition that his declaration clearly states a cause of action, but instead attempts to convert the ruling of the trial court into a holding that a pedestrian cannot recover damages occasioned

by an obstruction *carelessly and negligently* placed on the sidewalk.

The ruling of the trial court was simply that the plaintiff had not set forth in his declaration sufficient FACTS to show that the obstruction of which the plaintiff complained, which was lawful, was *in fact* so *negligently* and *carelessly* placed as to make the defendant liable if the plaintiff stumbled over it. In other words, the holding recognized the temporary use of a skid board for unloading goods as a lawful use of the streets in the absence of a definite charge of negligence in its use.

The authorities cited by the plaintiff are not addressed to the point presented to this Court; his cases relate to the liability of municipalities for the condition of their streets, and to questions of contributory negligence:

District of Columbia *vs.* Haller, 4 App. D. C. 405, is cited on the proposition that a person is not required to "look far ahead for obstructions or defects *which ought not to be suffered to exist*" which cannot apply to this case for the reason that the "obstruction" complained of here was lawful.

Mosheuvel *vs.* District of Columbia, 191 U. S. 247, involved the question of whether the plaintiff was guilty of contributory negligence in attempting to step over an open water-box in the sidewalk.

Johnson *vs.* City of Fargo, 108 N. W. 243, is not, as stated by appellant, similar to the case at bar in every respect. No question was raised there as to the sufficiency of the allegations of the declaration and

the principal question discussed is whether the plaintiff was guilty of contributory negligence.

In *Hechman vs. Evenson*, 73 N. W. 427, the plaintiff was injured by stepping on rough stone intentionally scattered over a part of the street and leaving a rough, uneven surface. There, also, the question was principally one of contributory negligence.

In *Finch vs. Village*, 94 N. W. 738, the action was against the municipality in connection with work done by it. The quotation given by the appellant should be completed to adding to it *what* the court said was for the determination of the jury, namely:

“* * * it was for the jury to determine whether the plaintiff was injured in the way she states, whether it was reasonable or negligent for the city to so dispose of the material, and whether the plaintiff was negligent in crossing the street at the place and time, in the manner adopted, and under the circumstances.”

And in the case of *Brush Electric Company vs. Kelly*, quoted at length from 10 A. L. R. 250, the court specifically says:

“*There is no contention that the complaint does not sufficiently charge negligence upon the appellant, * * * .*”

In the *Haller* case, *supra*, cited by appellant, suit was brought for injuries caused by a defect in the sidewalk and this Court said:

“In such actions as the present, *two things must concur to support the action*. First, the

injury must be shown to have been caused by a defective condition of the street or sidewalk—such defective condition being shown to exist by the *negligence* of the defendant; and, second, that there was no want of ordinary care to avoid such injury on the part of the plaintiff.”

In the instant case, we submit, the plaintiff does not allege any specific act of *negligence* on the part of the defendant but has contented himself by simply alleging that the defendant placed a skid board from its truck to a point on the sidewalk three feet from the curb for the purpose of making a delivery and that he stumbled over such “obstruction”. As this is plaintiff’s second attempt to state his case it must be assumed that he has now stated it in its most favorable aspect. *Coffey vs. Colonial Trust Company*, 59 W. L. R. 471.

We submit the declaration does not set forth any FACTS showing actionable negligence on the part of the defendant; the demurrer was, under the authorities, properly sustained; and that the judgment appealed from should be affirmed.

Respectfully submitted,

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